

HERMANN T. KROENER

IBLA 91-79

Decided August 27, 1992

Appeal from a decision of the Alaska State Office, Bureau of Land Management, confirming legislative approval of Native allotment application AA-7793.

Vacated and remanded.

1. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments--Surveys of Public Lands: Generally

When BLM changes the location of a Native allotment claim from its originally intended location during the course of the survey of the claim boundaries to compensate for loss of a portion of the original claim by erosion, and confirms the legislative approval of the claim in its new location, the Board will set aside the BLM decision and remand the case for resurvey and reconfirmation of the legislative approval of the claim in its original location.

APPEARANCES: Edward L. Miner, Esq., Anchorage, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Hermann T. Kroener has appealed from an October 29, 1990, decision of the Alaska State Office, Bureau of Land Management (BLM), confirming legislative approval of Native allotment application AA-7793, held by the heir of Elena Bartman, pursuant to section 905 of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634 (1988).

On April 17, 1972, Elena Bartman filed a Native allotment application for a parcel on the shores of Nushagak Bay near the outlet of the Igushik River. ^{1/} In her application, Bartman stated that the approximate location

^{1/} Her application was filed pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), which authorized BLM to allot up to 160 acres of land to an Alaskan Native upon satisfactory proof of substantially continuous use and occupancy for a 5-year period. This Act was repealed by section 18(a) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1617(a) (1988), effective Dec. 18, 1971, with a savings provision for Native allotment applications pending on that date. Bartman's application, which was signed on May 18, 1971, was deemed to be pending on Dec. 18, 1971.

of her parcel, which was about 5 acres in size, was protracted fractional NW $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 16, T. 17 S., R. 58 W., Seward Meridian, Alaska. Her parcel, which was also depicted on an attached Geological Survey quadrangle map (Nushagak Bay (C-3)), was reported to have been marked and posted on the ground as well. Bartman claimed that she had used and occupied the parcel during the period between May and September every year since 1945, for trapping, fishing, and drying meat. Her improvements were said to consist of a foundation, smokehouse, fish rack, and steam bath, all constructed in 1965 and valued at \$500.

On September 8, 1973, Phillip D. Moreland, a BLM realty specialist, conducted a field examination of Bartman's allotment claim. Bartman did not accompany him to the site, and he determined the location of all four corners of the claim on the ground based on "red signs painted with the applicant's name and serial number" (Land Report, dated Sept. 9, 1973, at 1). Within the boundaries of the claim Moreland found: "[O]ne foundation of the type used to build elevated buildings; one boathouse on [a] foundation with a tent frame attached; [2/] a steam bath made out of a boat hull; a smokehouse also made out of a boat hull; one 12' x 16' cabin; [3/] a fish rack; and one 8' x 8' cache." Id. In addition, he noted "substantial evidence of recent use and occupancy." Id. He nailed an aluminum tag to the north end of the cabin.

On March 15, 1974, Moreland recommended approval of the allotment application because "the applicant has met the requirements to qualify for a Native allotment." Id. at 3. However, he recommended that the size of the claim be reduced to encompass only Bartman's improvements and exclude Kroener's. 4/ The District Manager, Anchorage District, Alaska, BLM, concurred in Moreland's findings and recommendation on March 22, 1974.

On July 16, 1974, Ekuk Natives Limited (Ekuk), a Native village corporation, filed a selection application, AA-6662-F, for sec. 16, T. 17 S.,

2/ Moreland reported that the boathouse bore a sign stating that it was "'property of the Kroeners'" and that this fact was confirmed by the guide who accompanied him to the site (Land Report at 1).

3/ Moreland believed that the initials "E.B." he observed painted on the side of the cabin referred to Bartman (Land Report at 1).

4/ The Land Report contains the following description of the reduced claim:

"Beginning at a point on the shore of Nushagak Bay located approximately 250 feet northerly of Elena Bartman's cabin and a common corner to the allotment of Mary Tilden, A-054453 B; thence south 40° west approximately 300 feet along the common boundary between the two allotments; thence (approximately) south 60° east approximately 440 feet; thence north 50° east approximately 240 feet to a point on the shore of Nushagak Bay with the line passing mid-way between the Kroener boathouse and the Bartman steam bath; thence northerly along the meander to the point of beginning containing only the improvements of Elena Bartman and approximately three acres." Id. at 2-3.

R. 58 W., Seward Meridian, Alaska, pursuant to section 12 of ANCSA, as amended, 43 U.S.C. § 1613 (1988). The surface estate of that land (excluding Bartman's allotment claim) was eventually conveyed to Choggiung Limited, successor to Ekuk, on September 17, 1979, under Interim Conveyance No. 239.

By letter dated April 11, 1975, the State Office notified Bartman that BLM was considering approving her allotment application for "approximately 4 acres." The reason for reducing the size of the allotment was to exclude the Kroeners' improvements. Bartman was also informed that she would have 60 days to submit additional information "in support of [her] claim to the lands containing the Kroener improvements." The State Office stated that, in the absence of satisfactory evidence, Bartman "[would] be allotted approximately 4 acres and adverse action [would] be taken on the area containing improvements belonging to the Kroeners."

There is no evidence in the record that Bartman responded to BLM's April 1975 letter. On August 1, 1975, BLM approved her allotment application as to the 4-acre tract, excluding the Kroeners' boathouse, and rejected the application as to the remaining land because Bartman had failed to present "clear and credible evidence of her entitlement to an allotment in excess of 4 acres." Bartman filed an appeal to this Board. In Elena Bartman, 43 IBLA 284 (1979), we set aside the August 1975 BLM decision and remanded the case to BLM directing it to reconsider whether the Kroeners' improvements precluded Bartman's Native allotment use and occupancy requirements and, if it had, to institute contest proceedings. See id. at 286-87.

By letter dated January 26, 1983, BLM notified Bartman that her allotment application, encompassing "approximately five acres" had been legislatively approved pursuant to section 905 of ANILCA. 5/ Bartman was afforded 60 days to amend the land description (pursuant to section 905(c) of ANILCA, 43 U.S.C. § 1634(c) (1988)) if the description did not designate the land she intended to claim. 6/ The letter also stated that, if

5/ Section 905(a) of ANILCA, 43 U.S.C. § 1634(a) (1988), provides that, with certain exceptions and subject to valid existing rights, a Native allotment application pending before the Department on Dec. 18, 1971, describing land which was unreserved on Dec. 13, 1968, would be approved on the 180th day following Dec. 2, 1980. One of the described exceptions was when a protest is filed within the 180-day period which asserted that the protestant held improvements on the land sought and that the applicant was not entitled to the land. 43 U.S.C. § 1634(a)(5) (1988). Kroener filed no such protest and legislative approval of Bartman's application was not precluded by that exception. See Thelma M. Eckert, 115 IBLA 43, 47-48 (1990). Valid legislative approval removes the Department's authority to determine whether Bartman had satisfied the use and occupancy requirements of the Act of May 17, 1906. See id. at 46.

6/ Section 905(c) of ANILCA authorizes amendment of the land description if it designates land other than that which the applicant intended to claim at

there was no request for amendment, the land would be surveyed and a certificate of allotment issued. Bartman responded to the January 1983 letter on February 23, 1983, stating that the location of her allotment was "correct." 7/

On March 7, 1983, the Acting Chief, Native Allotment Section, Alaska, BLM, requested a survey of Bartman's allotment claim by the Cadastral Survey, Alaska, BLM. In his request, the description of the land to be surveyed was changed from the description in the September 1973 Land Report by expanding the claim from 3 to 5 acres and encompassing all of the land delineated by the original "posted" corners.

Special Instructions for the survey of Bartman's allotment (Lot 1, U.S. Survey No. 7799, Alaska) were approved by Deputy State Director for Cadastral Survey, Alaska, BLM, on April 18, 1984. The instructions directed the surveyor to "take particular care to ensure that only Elena Bartman's improvements are included" and that the southern boundary (line 3-4) "will be established so as to pass mid-way between the Kroener boathouse and the Bartman steam bath." Id. at 3. The Instructions also stated that the tract "will not exceed 5.00 acres," and that the western boundary (line 2-3) "may be adjusted in a southwesterly or northeasterly direction to accommodate the allotted acreage." 8/ Id. at 2. Bartman's allotment claim was surveyed sometime between July 26 and September 7, 1988. The survey was accepted

fn. 6 (continued)

the time of application and if the description as amended describes the land originally intended to be claimed. 43 U.S.C. § 1634(c) (1988). This section essentially embodies pre-existing authority. See Angeline Galbraith, 97 IBLA 132, 146 n.4, 94 I.D. 151, 158 n.4 (1987); Stephen Northway, 96 IBLA 301, 307 n.5 (1987); Charlie R. Biederman, 61 IBLA 189, 191-92 (1982); Edith Jacquot, 27 IBLA 231, 233 (1976). If a correction is indicated, the State and all interested parties must be given notice of the intended correction and afforded 60 days to protest, effectively precluding legislative approval of the amended application. See 43 U.S.C. § 1634(c) (1988).

7/ Bartman died on Sept. 14, 1985, leaving one heir (Eva Bartman Heyano).

8/ The Special Instructions described Bartman's claim as:

"Beginning at the point for corner No. 1, Lot 1, identical with corner No. 1, U.S. Survey No. 7594, a meander corner at the line of mean high tide on the westerly shore of Nushagak Bay, located approximately 4.0 chains north of an aluminum tag nailed to the north end of Elena Bartman's cabin; thence S. 40° W., on a portion of line 1-2, U.S. Survey No. 7594, approximately 4.5 chains to corner No. 2, Lot 1, located on line 1-2, U.S. Survey No. 7594; thence southeasterly, approximately 8.2 chains to corner No. 3, Lot 1; thence northeasterly, approximately 3.0 chains to corner No. 4, Lot 1, a meander corner at the line of mean high tide on the westerly shore of Nushagak Bay; thence northwesterly, with meanders along the line of mean high tide on the westerly shore of Nushagak Bay, approximately 9.0 chains to corner No. 1, Lot 1, the point of beginning."

Id. at 2.

on July 6, 1990, and was deemed officially filed on July 18, 1990. As surveyed, the claim encompasses 4.99 acres. 9/

In its October 1990 decision, BLM confirmed the legislative approval of Bartman's allotment application pursuant to section 905 of ANILCA, describing her tract as surveyed in U.S. Survey No. 7799. However, Bristol Bay Native Association (BBNA), acting on behalf of Bartman's heir, was afforded 30 days from receipt of the decision to object to the surveyed location of the allotment on the grounds that it was not the intended location. The decision stated that, in the absence of an objection, the allotment "will be considered correctly surveyed." 10/ On November 19, 1990, BBNA submitted a November 7, 1990, statement by Bartman's heir accepting the survey. Kroener appealed from the October 1990 BLM decision.

In his statement of reasons (SOR) for appeal, Kroener contends that BLM improperly confirmed the allotment because a portion of the land in Lot 1, U.S. Survey No. 7799, Alaska, was not originally claimed by Bartman in her allotment application and has long been claimed by Kroener and his wife 11/ under section 14(c) of ANCSA, as amended, 43 U.S.C. § 1613(c) (1988). 12/ He contends that, when BLM surveyed Bartman's claim a portion of the land sought by her had eroded away, and that BLM had shifted the location of the claim to make up the deficiency in acreage. He contends that this action violated section 905(c) of ANILCA. 13/

9/ The surveyed claim was placed in protracted fractional secs. 16 and 17, T. 17 S., R. 58 W., Seward Meridian, Alaska. The field notes of the survey do not indicate the recovery of any of Bartman's original corner posts.

10/ In the same decision BLM rejected Native village selection application AA-6662-F to the extent of the conflict with Bartman's allotment.

11/ The record indicates that Kroener's wife, an Alaskan Native, filed allotment application AA-7591 for 154.99 acres of land. The closest tract of land encompassed by her application is situated about 1-1/2 miles north of the Bartman tract.

12/ We believe that Kroener is referring to the provision in section 14(c) of ANCSA providing that, upon receipt of a patent to land, a Native village corporation shall convey to "any Native or non-Native occupant, without consideration, title to the surface estate in the tract occupied as of December 18, 1971 * * * as a primary place of residence * * * or as a subsistence campsite." 43 U.S.C. § 1613(c)(1) (1988). We express no opinion as to whether Kroener and his wife are entitled to any land which is patented to Choggiung Limited.

13/ Kroener contends that Bartman's claim now encompasses the Kroener boathouse (which was moved further inland and beyond the western boundary of Bartman's claim in 1984) and a new cabin the Kroeners built just outside the western boundary of that claim in 1979. See Letter to BLM, dated Jan. 7, 1990, at 3. The location of these structures relative to the 1973 boundaries of Bartman's claim are depicted on an aerial photograph taken in September 1988 and originally submitted to BLM in January 1990 and on an aerial photograph taken in August 1988 and submitted with Kroener's SOR (Exh. 9).

At the outset, it is apparent from a comparison of an aerial photograph of the area of Bartman's claim taken at the time of the 1973 field examination (Photo No. 9 attached to Land Report) and an aerial photograph of the same area taken by Kroener in August 1988 (Exh. 9 attached to SOR), that the shoreline of Nushagak Bay was eroded to the southwest between the date that Bartman's allotment claim posts were recovered by Moreland during his September 1973 field examination and the summer of 1988, when BLM surveyed the claim. The photographs were taken from much the same general perspective (just over the bay to the east of the Bartman claim) and depict the shoreline along the bay, a narrow stretch of beach, and a low-lying, vegetated area broken by various shallow potholes and gullies. An identifying gully runs from left to right across each of the photographs, another gully which intersects the first recedes from view back into the photographs, and a pond is visible near the terminus of the gully closest to the viewer. The relationship of the two gullies and pond are distinctive in their configuration, general appearance, and relative proximity to each other.

The examiner depicted the boundaries of Bartman's original claim on the 1973 BLM photograph and Kroener has drawn the remnants of those boundaries on his 1988 photograph. 14/ When comparing the 1973 and 1988 photographs, it becomes apparent that the shoreline of the bay has moved to the southwest. In 1973, there was a considerable distance between the pond adjacent to the western boundary of Bartman's claim and the boundary between the vegetated area and the beach. In the August 1988 photograph the edge of the vegetated area is next to the pond, with only a narrow beach between the pond and the shoreline. It is impossible to accurately measure the change from the photographs, but it is clear that land originally claimed by Bartman in 1973 had been severely eroded by 1988, when the land was surveyed. 15/

Bartman is entitled to no land below the mean high tide line of the Nushagak Bay. See Hardin v. Jordan, 140 U.S. 371, 381 (1891). Thus, her heir has lost that portion of her original claim eroded away, and that part of her claim which is now below the mean high tide line. 16/

14/ The boundaries appear in the same position relative to the noted topographic features, and Kroener's depiction of the location of Bartman's original claim on his 1988 photograph appears to be accurate. BLM has not challenged Kroener's depiction of those boundaries even though it was presented with a similarly marked photograph in January 1990.

15/ Kroener submitted January 1990 affidavits of Nannie M. Jordan, who states that she fished next to Bartman's beach site for 10 years, Amelia B. Olson, Bartman's step-sister-in-law and mother of Kroener's wife, Hjalmar Olson, Amelia's husband, and the Kroeners who state that the land "washed away."

16/ Kroener submitted a Jan. 8, 1990, Nannie M. Jordan affidavit stating that the "tide reached all the way up to [the Kroeners'] cabin" during the summer of 1989. This statement is confirmed by Jan. 9, 1990, affidavits by Kroener and his wife. The August 1988 photograph shows the Kroeners'

By comparing the sketch map of the relative position of the Tilden (AA-054453-B) and Bartman (AA-7793) allotments attached to the September 1973 Land Report and the relative position of the Tilden and Bartman allotments on the 1990 plat for U.S. Survey No. 7799 it becomes obvious that BLM moved the original location of Bartman's claim to the southwest to compensate for the movement of the shoreline of Nushagak Bay.

On the 1973 sketch map, the northwestern corner of the Bartman claim lies approximately halfway down the adjoining southeasterly boundary of the Tilden claim, and the southeastern boundary of Tilden's claim continues in a southwesterly direction for about 350 feet before reaching its southern corner. This placement is confirmed in the description of the northwestern boundary of the Bartman claim found in the Land Report. On the 1990 survey plat the northwestern corner of the Bartman claim is now located at the southwestern corner of the Tilden claim; a clear shift of the Bartman claim to the southwest.

The configuration of Bartman's claim has also been changed significantly as well. Bartman's original application depicted that land on an attached quadrangle map, but contained no metes and bounds description. When Moreland conducted his field examination in September 1973, he found the claim to be marked on the ground. Using those markers, he described the claim. Her claim was roughly in the shape of a parallelogram with one corner to the north and the northeasterly boundary being the shoreline. The northwestern boundary was described as running approximately S. 40° W. for about 300 feet and the southwestern boundary was described as running approximately S. 60° E. for about 440 feet. The southeastern boundary was described as running approximately N. 50° E. for a distance of approximately 240 feet to the shore of the bay. See Land Report at 2. The southwestern boundary had been shortened by approximately 100 feet to exclude the Kroeners' boathouse.

Following the Board's 1979 decision in Elena Bartman, BLM restored Bartman's claim to its original posted boundaries. BLM informed Bartman of the restoration in a January 1983 letter, and she responded in February 1983 that the claim was correctly located. In March 1983, when BLM requested a survey of the claim by the Cadastral Survey, the description of the claim conformed to the posted boundaries. The Cadastral Survey did not conform the survey to this description, however. The northwesterly boundary of the claim was placed on a bearing of S. 40° W., but ran for a distance of 6.47 chains (427.02 feet) rather than 300 feet. A western boundary was set running South for a distance of 6.4 chains (422.4 feet) rather having a southwesterly boundary running S. 60° E. for 8.18 chains (540 feet). A southerly boundary running East for 6.58 chains (434.28 feet)

fn. 16 (continued)

cabin on that border between the vegetated area and the beach, suggesting that the mean high tide line may be at or near that border. If this is true, and the boundaries of Bartman's original claim, as depicted on the examiner's photograph, are accurate, there may be little left of her claim.

was surveyed when the March 1983 survey request called for a southeasterly boundary running N. 50° E. for 200 feet to the posted corner on the shore of the bay. The boundary of the claim along the bay was lengthened from about 650 feet (as depicted on the sketch map attached to the Land Report) to about 726 feet (as depicted on the survey plat).

Other physical evidence illustrates the shift as well. In September 1973, Moreland placed a 12- by 16-foot cabin, an 8- by 8-foot cache and a fish rack over 100 feet southwest of the boundary of Bartman's claim. See Sketch Map attached to Land Report. The relative location of the boundaries and structures is clearly depicted on photograph 9 in the Land Report. The 1988 survey plat now notes two clusters of improvements (described as wood frame buildings and fish racks) within Bartman's claim boundaries. One cluster of six structures is in the northeastern corner of the claim near the boundary. The second cluster of three structures is about 65 feet from the shoreline boundary. Some of these structures are fresh looking and have obviously been built after 1973.

Kroener identifies Bartman's cabin in the first cluster of structures and nearest the shoreline boundary (within about 20 feet). See Exh. 8 attached to SOR. This cabin can be identified on the August 1988 aerial photograph of the claim area which was submitted as Exhibit 9 to Kroener's SOR. Kroener indicates that the change in relative location of the cabin is due to Bartman having moved the cabin inland to avoid loss when the shoreline was eroded. See Letter to BLM from Kroener, dated Jan. 7, 1990, at 2. However, judging from the cabin's relation to surrounding topographic features shown in the August 1988 photograph, the cabin was moved only a short distance to the north and west. Thus, if the claim 1973 boundaries were unchanged, the cabin should now be in the northwestern corner of the claim. The 1988 survey places the cabin in the northeastern corner of the claim. This also establishes that the boundaries of the claim have been shifted to the southwest.

At the very least, by moving the boundaries of Bartman's claim to the southwest, BLM has made the size of her claim substantially larger than that she evidently intended to claim at the time of the September 1973 field examination. The apparent reason for doing this was to adjust the boundaries of the claim to accommodate the allotted 5 acres. However much of the original acreage had been eroded away. Id. at 2.

[1] BLM is not permitted by section 905(c) of ANILCA to unilaterally amend Bartman's claim. Any authority BLM may have under that statute is confined to bringing a Native allotment claim, as marked on the ground, in line with the intent of the allotment applicant when the application was made. 17/ See State of Alaska, 119 IBLA 260, 267 (1991). The statute

17/ Nor is there any other statutory provision which permits BLM to change the location of a claim for purposes other than to conform it to the applicant's original intent.

does not permit either the applicant or BLM to alter the claim by amending a land description to encompass new or additional land, even if the intent is to compensate the claimant for loss of land due to erosion. See Heirs of Edward Peter, 122 IBLA 109, 116-17 (1992); Mitchell Allen, 117 IBLA 330, 337 (1991); Joash Tukle, 86 IBLA 26, 26-27 (1985), aff'd, Tukle v. Hodel, No. 85-375 (D. Alaska Apr. 7, 1987). The authority is limited to correcting "errors" in the description when the description does not encompass the land the applicant originally intended to claim, and does not allow an applicant or BLM to deviate from the original intent. S. Rep. No. 413, 96th Cong., 2d Sess. 286, reprinted in 1980 U.S. Code Cong. & Admin. News 5070, 5230. That is precisely what BLM did in this case.

There is no evidence in the record that the posted location of the claim observed by Moreland during his September 1973 field examination and fully described in the March 1983 survey request was not the land which Bartman originally intended to claim. Although she had a number of opportunities to do so, Bartman never objected to BLM's placement of her claim. She was given specific notice of that location in January 1983, and responded in February 1983 that the location was "correct." Nor has her heir raised objection to the original description of the claim. Compare Daniel Roehl, 103 IBLA 96, 102 (1988). Therefore, we find no evidence of error in the original land description that would require a correction pursuant to section 905(c) of ANILCA. In the face of this we also find that when the land was surveyed in 1988 there was apparently no attempt to conform the survey to that description. By failing to faithfully survey the land described by Bartman, BLM deviated from her original intent, in violation of section 905(c) of ANILCA.

We recognize that a significant portion of Bartman's claim has apparently been lost as a result of forces of nature, and her heir will receive less land than she had originally claimed. However, the Department can do no more to rectify that situation because the erosion took place before the land was surveyed than it could do if the erosion were to take place after the allotment had passed to the allottee. If a substantial part of the allotted land had been lost through erosion prior to the repeal of the Act of May 17, 1906, Bartman could have amended her claim to include more land, including land she had not originally intended to claim. See Stephen Northway, supra at 307. However, that option was foreclosed on December 18, 1971, with the repeal of the Act of May 17, 1906. See Stephen Northway, supra at 307; Edith Szmyd, 50 IBLA 61, 62-63 (1980). Thereafter, she alone bore the risk that all or a portion of her claim might be lost to erosion, even if she was then entitled to an allotment. See Frank Rulland, 41 IBLA 207, 211-12, 86 I.D. 342, 344-45 (1979). Her claim did not automatically ebb and flow with the movement of the shoreline. See State of Alaska, supra at 270 n.19. It would have been necessary for her to affirmatively amend her application to include new or additional land not originally claimed, but no amendments could be made for this purpose after December 18, 1971.

When BLM surveyed Bartman's allotment claim it improperly moved her claim. The October 29, 1990, BLM decision confirming the legislative

approval of Bartman's claim in an incorrect location must be set aside and the case remanded to BLM to permit a redetermination of the location of what remains of Bartman's original claim, and resurvey. We agree with BLM's finding that Bartman's Native allotment application has been legislatively approved by section 905(a) of ANILCA, but it has been approved only as to that land encompassed by her original claim. Therefore, following completion of the resurvey, BLM should reconfirm that legislative approval. 18/

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is vacated and the case is remanded to BLM for further action consistent herewith.

R. W. Mullen
Administrative Judge

I concur:

John H. Kelly
Administrative Judge

18/ Any adversely affected party may appeal to the Board from that decision. Unless it can be shown to be otherwise, however, any appeal must be confined to a challenge to the redetermined location of the claim because, without that showing, all other issues are res judicata.